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No. 83-819

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SHIRLEY METZ,

Petitioner,

vs.

TOOTSIE ROLL INDUSTRIES, INC. and LOCAL UNION NO. 1, BAKERY, CONFECTIONERY AND TOBACCO WORKERS' INTERNATIONAL UNION OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF FACTS

Petitioner filed her complaint in District Court against Tootsie Roll Industries, Inc. ("TRI") and Local Union No. 1, Bakery, Confectionery and Tobacco Workers' International Union of America ("Union") on June 23, 1982. In Count I, brought under Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185, Petitioner alleged that she was terminated by TRI in violation of the collective bargaining agreement in effect between TRI and the Union, and that the Union breached its statutory duty of fair representation. In Count II of the complaint, brought solely against TRI, Petitioner alleged that

she was discharged in retaliation for seeking enforcement of statutory rights under the Workers Compensation Act, Ill.Rev.Stat., 1981, Ch. 48, Section 138.1, *et seq.*

Petitioner, in Count I of the complaint, made the following allegations:

(1) Petitioner was discharged by TRI on January 15, 1981.

(2) Petitioner denies that her discharge was for just cause under the collective bargaining agreement.

(3) Upon her discharge, Petitioner notified the Union of her grievance and requested that it enforce her rights under the collective bargaining agreement.

(4) The Union failed to initiate the grievance procedure and, thereafter, failed to process the grievance or to take any other affirmative action on Petitioner's behalf.

(5) The collective bargaining agreement between the Union and Employer provides that "all grievances must be filed within five days."

(6) On May 5, 1981, the Union, in a letter written to TRI, stated that it was the Union's position that TRI's action had violated Petitioner's rights under the collective bargaining agreement.

(7) Despite Petitioner's requests that the Union process her grievance, the Union failed and refused to process a grievance on Petitioner's behalf or to take any further action on Petitioner's discharge from May 5, 1981 to the time of the filing of her complaint on June 23, 1982.

Both TRI and the Union filed Motions to Dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The District Court dismissed the fair representation claim, Count I, on the basis that it was barred by the applicable statute of limitations.

On appeal to the Seventh Circuit Court of Appeals, Petitioner filed a Motion To Supplement The Record On Appeal with a letter dated June 7, 1982 (a copy of which appears in the Appendix, at 18a, to the Petition For Writ of Certiorari). Such Motion was granted by the Court of Appeals. 715 F.2d 299, 300, n.1. The letter is dated just over two weeks prior to the filing of the complaint, is addressed to the Petitioner's attorneys from the Union's attorneys, and is a response to an earlier communication from Petitioner's attorneys. The letter states that the Union has repeatedly attempted to set up a meeting among the Union, TRI and Petitioner; that Petitioner has failed to respond to such attempts; and that such a meeting is still available.

The Court of Appeals, relying on *DelCostello* v. *International Brotherhood of Teamsters*, — U.S. —, 103 S.Ct. 2281, 2290 (1983), (715 F.2d at 302, 303, 306), affirmed the District Court's dismissal of the Section 301 fair representation claim on the grounds that such claim was barred by the applicable statute of limitations, the six month statute of limitations provided by Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b).

REASONS FOR DENIAL OF CERTIORARI

I. The Court of Appeals Correctly Determined That A Union's Failure And Refusal To Initiate The Grievance Procedure Is A Final Determination For Purposes Of The Running Of The Statute Of Limitations.

In *DelCostello* v. *International Brotherhood of Teamsters*, — U.S. —, 103 S.Ct. 2281, 2290, this Court held that the six month statute of limitations provided by Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b), is the applicable statute of limitations governing employee actions under Section 301 against both employers

and unions, where it is alleged that the employer violated a collective bargaining agreement and the union breached its duty of fair representation. The Court of Appeals, therefore, correctly held that the six month statute enunciated in *DelCostello* governs the present case. 715 F.2d at 303.

The Court of Appeals, further, correctly concluded that Petitioner's claim was barred by the six month statute of limitations. In reaching such conclusion, the Court of Appeals properly rejected Petitioner's contention that "[s]ince no final determination has been made with regard to this grievance, the six-month limitations period has not yet commenced." Petition, at 8. As recognized by the Court of Appeals, "Appellant's contention that the statute has not yet begun to run raises the interesting issue whether any cause of action has yet accrued to the appellant. That is, the point at which the cause of action would normally accrue is the same point at which a statute of limitations would begin to run." 715 F.2d at 303, n.7.

Contrary to Petitioner's suggestions, this case simply does not raise the issues of what action on a union's part triggers the running of the statute of limitations or when an employee should be aware that a breach has been committed. Rather, the facts of this case make it clear that this employee was well aware, over a year prior to the filing of her complaint, of the facts of her discharge, of the contractual grievance provisions, and of the Union's failure to file a grievance pursuant to those provisions.

The Court of Appeals correctly concluded that Petitioner's complaint revealed on its face that it was barred by the six month statute of limitations. As the Court found:

> "... [Petitioner] has alleged that under the collective bargaining agreement all cases of discharge are subject to the grievance procedure, that all grievances must be

> filed within five days and that the Union failed to initiate the grievance procedure. We believe, therefore, that under the language of the collective bargaining agreement, the failure and refusal of the Union to file the grievance within the specified time amounted to a final decision." 715 F.2d at 303.

If, as alleged by Petitioner, the Union failed and refused to file a grievance on her behalf, then Petitioner's discharge from employment became final and binding pursuant to the collectively-bargained for grievance procedure when not grieved by the Union within five (5) days after her discharge, or on January 20, 1981. Petitioner's cause of action against the Union thus began to run at that time.

The Court of Appeals properly rejected Petitioner's suggestion that no statute of limitations period has begun to run against her because she has received no final determination regarding the action taken or not taken on her grievance. This Court, in *United Parcel Service* v. *Mitchell*, 451 U.S. 56 (1981) and *DelCostello*, in selecting relatively short statutes of limitation, focused on the nature of the action—an action for breach of the duty of fair representation—and not on the stage of the grievance-arbitration procedure at which the breach is alleged to have occurred. Thus, in *Mitchell*, this Court said:

> "We think that the unfair representation claim made by an employee against his union, even though his employer may ultimately be called upon to respond in damages for it if he is successful, is more a creature of 'labor law' as it has developed since the enactment of § 301 than it is of general contract law." *Mitchell*, 451 U.S. at 63.

In *DelCostello*, this Court characterized duty-of-fair representation claims as "allegations of unfair, arbitrary, or discriminatory treatment of workers by unions." —— U.S. at ——, 103 S.Ct. at 2293. The *DelCostello* Court quoted with

approval Justice Stewart's observation in a concurring opinion in *Mitchell*:

> "The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it.' [*Auto Workers* v. *Hoosier Corp.*, 386 U.S. 696, 702 (1966)] . . . 451 U.S. at 70-71 (opinion concurring in the judgment) (footnote omitted)."

Where a collectively-bargained for grievance procedure requires that all grievances must be filed within five days, a failure or refusal to launch the grievance procedure results in just as final and binding a determination with respect to the employee as does a failure or refusal not to pursue a grievance all the way to arbitration.

Lower federal courts faced with this issue have reached similar conclusions. In *Hall* v. *Printing and Graphic Arts Union, Local No. 3*, 696 F.2d 494 (7th Cir., 1982), the Court rejected a contention that a union's failure to pursue a discharge grievance to arbitration was less final and binding with respect to the employee than is an arbitrator's award:

> "Nothing in the language of the collective bargaining agreement convinces us that decisions by the Local not to pursue an employee's grievance all the way to arbitration are any less final or reliable than arbitration awards." 696 F.2d at 497, footnote omitted.

In *Badon* v. *General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982), decided after *Mitchell* but before *DelCostello*, the plaintiff alleged that the union failed to represent him fairly in the processing of his pension claim against the employer. After the employer denied the pension claim, the

union, under the terms of the collective bargaining agreement, had thirty days in which to file an appeal of the decision. No appeal was filed. The Sixth Circuit concluded that the failure to file an appeal resulted in as final and binding a decision with respect to the employee as would have resulted from arbitration:

> "[W]here an employer's decision has become final through the operation of the collectively bargained-for private system of dispute resolutions, the rule of Mitchell applies and the state statute of limitations pertaining to the vacation of arbitration awards will be utilized in subsequent federal court proceedings." 679 F.2d at 98.

In *Bigbie* v. *Teamsters, Local 142*, 530 F.Supp. 402 (N.D. Ill., 1981), the Court held that a fair representation claim was barred by the 90-day arbitration statute where the union had failed to file a grievance on the plaintiff's behalf. The Court found that, under *Mitchell*:

> "[I]t is quite irrelevant at what point in the contractual grievance procedure the union's breach of its duty of fair representation has occurred. Whether union has failed to file any grievance at all (as alleged here) or has failed to represent the employee fairly before the grievance committee (as in Davidson [v. *Roadway Express, Inc.*, 650 F.2d 902 (7th Cir. 1981)]) or has failed to appeal from an adverse arbitration decision (as in Mitchell) has no significance in relation to the substance of a Section 301 claim: whether Union has breached its duty of fair representation. From the employee's viewpoint a union's refusal to launch the grievance is just as 'final and binding' as a refusal to carry forward a grievance at any point after the procedure has been invoked." 530 F.Supp. at 405.

Other district courts, in cases decided after *Mitchell* but prior to *DelCostello*, have, similarly, held that claims against unions and employers under Section 301 in which

it is alleged that the union failed or refused to file or process a grievance are governed by state statutes for actions to vacate arbitration awards or by the six month limit in Section 10(b) of the NLRA, and that such claims accrue at the time a grievance would have had to have been filed or processed under the applicable collective bargaining agreement. *Russom* v. *Sears, Roebuck & Co.*, 113 LRRM 2353, 2364, 2366 (E.D.Mo. 1982); *Gardner* v. *Illinois Bell Telephone Co.*, —— F.Supp. ——, 112 LRRM 2360, 2362 (C.D. Ill. 1982); *Orange* v. *Safeway Stores, Inc.*, 556 F. Supp. 510 (D.D.C. 1983); *Perez* v. *Dana Corp.*, 545 F.Supp. 950 (E.D.Pa., 1982); *Lewis* v. *Harbison-Walker Refractories*, 542 F.Supp. 1381 (N.D. Ind. 1982); *Brice* v. *McDonnell Douglas Corp.*, —— F.Supp. ——, 111 LRRM 2031 (D.C.Cal. 1982).

In the present case, Petitioner alleges that, although she was discharged on January 15, 1981 and asked the Union to file a grievance on her behalf, the Union failed to initiate the grievance procedure or take any action on her behalf. The grievance procedure provides that grievances must be filed within five days. Five days after discharge, Petitioner's discharge thus became final and binding through the operation of the collectively-bargained for system of dispute resolution. At that time, Petitioner's cause of action accrued. Since Petitioner was aware that the Union had failed to file a grievance despite her requests, this case simply presents no issue as to when the six month limitations period began to run.

II. The Court Of Appeals Correctly Applied The General Rule That A Statute Of Limitations Begins To Run When The Claimant Discovers, Or In The Exercise Of Reasonable Diligence Would Have Discovered, The Acts Constituting The Alleged Violation.

The Court of Appeals correctly rejected Petitioner's contention that no statute of limitations period has yet

begun to run because "petitioner never was informed of the status of her grievance." (Petition at 6.) Under Petitioner's theory, the statute of limitations does not begin to run until she receives some kind of official notification. Were this theory to be carried to its extreme, Petitioner would not be barred from initiating a fair representation action against the Union twenty years hence. Such a theory clearly flies in the face of the federal labor policies reaffirmed by this Court in *United Parcel Service* v. *Mitchell*, 451 U.S. 56, 63 and *DelCostello* v. *International Brotherhood of Teamsters*, ___ U.S. ___, 103 S.Ct. 2281, 2292-93, favoring the rapid and final resolution of labor disputes.

This case does not raise the issue of at what point in time an employee should realize that a union's inaction constitutes a breach of its duty of fair representation because, in this case, it is undisputed that Petitioner knew, over a year prior to filing her complaint, that the Union had failed to grieve her discharge. This is not a case where an employee was misled into thinking a union had filed a grievance when it had not actually done so, nor is it a case where an employee was unaware of the action taken against her by her employer.

The Court of Appeals properly found that the applicable rule was that consistently used by courts and the National Labor Relations Board in applying Section 10(b) of the NLRA to unfair labor practice charges. Such general rule provides that the limitations period begins to run "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation]." *Hungerford* v. *United States*, 307 F.2d 99, 102 (9th Cir. 1962); see also *N.L.R.B.* v. *Don Burgess Construction Corp.*, 596 F.2d 378, 382 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979). The Court of Appeals applied this general rule correctly in finding that "[t]his case falls

within the 'should have discovered' prong of the *Hungerford* rule. At some point prior to six months preceding the time this action was brought, the appellant, in the exercise of reasonable diligence, should have discovered the acts constituting the alleged violation." 715 F.2d at 304.

An unfair representation action may be based either on alleged wrongful action on a union's part or an alleged wrongful inaction. In the present case, the basis for Petitioner's claim is alleged inaction on the part of the Union. Petitioner's argument that her cause of action does not begin to run until she receives some kind of official notice of the Union's inaction has no support in law. Once the Union stopped acting or failed to act on her grievance, Petitioner "had at that point exhausted to the extent possible the grievance and arbitration procedures established by the collective bargaining agreement and was entitled to institute suit against . . . [her] union or employer under § 301. See *Clayton* v. *International Union, United Automobile Workers*, 451 U.S. 679, 101 S.Ct. 2088, 68 L.Ed. 2d 538 (1981)." *Martin* v. *Pullman Standard*, 538 F.Supp. 1174, 1176 (W.D.Pa. 1982).

Petitioner's complaint revealed on its face that she was, in fact, aware, over a year prior to the filing of her complaint, of the alleged inaction. She alleged that she was discharged on January 15, 1981; that, upon her discharge, she notified the Union; but that the Union failed to file a grievance within the five day time limit under the collective bargaining agreement. As the Court of Appeals found, once a grievance is filed within the required five day period, the contract requires it to be processed through the steps of the grievance procedure within a relatively rapid period of time. Under the contractual provisions, where no arbitration is requested, the grievance procedure would be ex-

hausted in approximately 23 days. 715 F.2d at 300-301, n.3., 302.

Nowhere in the complaint did Petitioner allege that either the Union or the Employer had misled her to believe that a grievance had been filed or was pending when such was not the case. Rather, Petitioner alleged that despite her repeated requests that the Union process her grievance, the Union "failed and refused" to do so. The Court of Appeals correctly found that:

> ". . . It is uncontested that from May 5, 1981, until the present, the Union took no action at all. Since this action was brought on June 23, 1982, almost seven months of union inactivity preceded the six month statutory period. At some point prior to the six month statutory period, the appellant should have realized that the Union was taking no action on her behalf. The appellant cannot be allowed to sit back and claim a lack of notice in light of circumstances such as these. Since the alleged violation, which consisted of union inactivity, should have been discovered by a reasonably diligent claimant prior to the statutory period, the *Hungerford* test is satisfied." 715 F.2d at 304.

Petitioner's argument that the limitations period has not yet begun to run is in no way supported by the fact that the Union wrote a letter to TRI in May, 1981 stating that TRI's action violated Petitioner's rights under the collective bargaining agreement or by the fact that in June, 1982, two weeks prior to the filing of the lawsuit, the Union's attorneys, responding to a communication from Petitioner's attorneys, offered to set up a meeting among the parties. The letter of June, 1982 does not mention any grievance. Rather, it indicates only that the Union was willing to set up a meeting. The Union's action in offering to set up a meeting in June, 1982 did not reopen a statute of limitations that had already run out at least seven months earlier. This

conclusion was reached by a district court recently faced with an argument similar to that made by Petitioner here:

> "Plaintiff's counsel has also suggested that the grievance procedure was somehow revived by informal discussions on plaintiff's grievance initiated by International Representative Ned Davy at the request of plaintiff's counsel in September, 1979. Yet these discussions were held on an informal basis as a courtesy to plaintiff and could not by the terms of the collective bargaining agreement revive a grievance that had long since become final. To permit such informal action to toll the statute of limitations after it has expired would totally violate the statute's effect. Thus a plaintiff would request at anytime even years later reconsideration of a final grievance resolution and a union would lose the protection of the statute merely by agreeing to assist the plaintiff. Nothing in the equitable doctrine of tolling supports such a result." *Hardesty* v. *Essex Group, Inc.*, — F.Supp. —, 133 LRRM 2690, 2696 (N.D. Ind. 1982).

In *Adkins* v. *General Motors Corp.*, — F.Supp. —, 113 LRRM 2147, 2151 (S.D.Ohio, 1983), the Court noted that: "[t]he general rule appears to be that a § 301 action accrues no later than the time Plaintiff 'knew or reasonably should have known that [a breach of the duty of fair representation] had occurred, even if some possibility of nonjudicial enforcement remained.' *Santos* v. *District Council of New York City*, 619 F.2d 963, 969 (2nd Cir. 1980)."

III. The Court Of Appeals Properly Rejected Petitioner's Argument That The Union's Alleged Conduct In Failing To Represent Her Constitutes A Continuing Violation Of The Duty Of Fair Representation.

This case does not raise the issue of whether a breach of the duty of fair representation may constitute a continuing violation. All that occurred in the six months prior to the filing of the complaint was Union inaction, and it is

undisputed that Petitioner had already been aware of the Union's failure to act on her request to file a grievance for at least seven months prior to the limitations period. Moreover, this is not a case where a union's failure to act resulted in new or repeated harm to an employee. When no grievance was filed over Petitioner's discharge, that discharge became final. Nothing more resulted from the Union's continued inaction after that point.

The Court of Appeals correctly found Petitioner's reliance on the continuing violation doctrine to be misplaced. Contrary to Petitioner's assertions, there is no support in court cases applying Section 10(b) of the NLRA for finding a union's failure to file a grievance as constituting a continuing unfair labor practice. Moreover, even in those situations where the continuing violation theory has been found applicable, the courts have required a finding of an independent violation of the continuing obligation in question within the six month period.

As recognized by the Court of Appeals, this Court, in *Local Lodge No. 1424, International Association of Machinists* v. *N.L.R.B.*, 362 U.S. 411 (1960) ("Bryan Manufacturing"), held that a continuing violation theory is not intended to be used to revive unfair labor practices occurring outside of the limitations period. This Court, in *Bryan Manufacturing*, found that, "where occurrences within the six month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices," earlier events may be used to shed light on the events within the six month period. Where, however, "conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice," the otherwise legal action occurring within the limitations period does not revive the "legally defunct unfair labor practice." *Bryan Manufacturing*, 362 U.S. at 416-17; 715 F.2d at 305.

In the present case, nothing but inaction on the Union's part is alleged within the six month period. Even if such conduct constituted a breach of the duty of fair representation, it would constitute such a breach only by reason of events occurring outside the limitations period, i.e. the Petitioner's discharge and the Union's refusal to initiate a grievance.

Moreover, contrary to Petitioner's assertion, the continuing violation analysis has not been found applicable to a union's refusal or failure to process grievances. In *United Rubber Workers* v. *N.L.R.B.*, 368 F.2d 12 (5th Cir. 1966) (Petition at 10), the Court affirmed the Board's finding that an unfair labor practice charge had been timely filed, where the Board had specifically found that the union had, within the six month limitations period, refused instructions from its international union to process the charging employees' grievances. 150 NLRB at 333. Neither the Court nor the Board. in that case, made any finding of a continuing violation.

The Board's continuing violation theory has been applied only in certain circumstances where a party is under some kind of continuing obligation. Moreover, even where such a continuing obligation exists, there must be an independent violation of that obligation within the six month period. Thus, in *N.L.R.B.* v. *Basic Wire Products, Inc.*, 516 F.2d 261 (6th Cir. 1975) (Petition at 10), the Court noted that, because of a Board rule that a union's certification as collective bargaining representative, if based on a Board-conducted election, must be honored for one year, the employer was under a continuing obligation to bargain with the union for one year. Even so, however, a charge based upon a refusal more than six months old would be untimely: "The Union was required under Section 10(b) to bring an unfair labor practice charge within six months of the refusal in question." *Id.* at 268.

In *Albritton Engineering Corp.*, 340 F.2d 281 (5th Cir. 1964), *cert. denied*, 382 U.S. 815 (1965) (Petition at 10), the Court found that, where the employer had told applicants that their original employment applications would be considered continuing applications, the company committed a separate unfair labor practice each time within the 10(b) period that it by-passed such applicants for discriminatory reasons.

In the present case, any breach on the part of the Union would have occurred, if at all, when it failed and refused to file a grievance within five days of Petitioner's discharge. Moreover, no alleged refusal occurred within the six month limitations period. All that is alleged to have occurred within the six month period is inactivity, and such inactivity cannot, without reliance on earlier events, be found to constitute a breach of the duty of fair representation. A finding that mere continued inaction on the part of a union constitutes a continuing violation would mean that an employee could file a fair representation action years after a union's failure or refusal to file a grievance, even though an employee was well aware at the time a grievance should have been filed under that contract that no grievance had been filed. Such a finding would clearly run contrary to the very purpose of the relatively short statute of limitations selected by this Court in *DelCostello*.

CONCLUSION

For the above reasons, the Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

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